

**UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA**

Norfolk Division

BASF PLANT SCIENCE, LP,)	
)	
Plaintiff,)	
)	
v.)	
)	
COMMONWEALTH SCIENTIFIC AND)	
INDUSTRIAL RESEARCH)	
ORGANISATION,)	
)	
Defendant.)	C.A. No. 2:17-CV-503-HCM
)	
COMMONWEALTH SCIENTIFIC AND)	JURY TRIAL DEMANDED
INDUSTRIAL RESEARCH)	
ORGANISATION, GRAINS RESEARCH)	
AND DEVELOPMENT CORP., AND)	
NUSEED PTY LTD.,)	
)	
Plaintiffs-Counterclaimants,)	
)	
v.)	
)	
BASF PLANT SCIENCE, LP, AND)	
CARGILL, INCORPORATED,)	
)	
Defendants-)	
Counterdefendants,)	
)	
BASF PLANT SCIENCE GMBH,)	
)	
Counter-Counterclaimant.)	
)	

PROONENTS' PROPOSED JURY INSTRUCTION ON MTEA

Proponents restate their objections made on the record on October 30, 2019, regarding the Court's proposed MTEA instruction. Proponents renew their request that the Court consider the following instruction.

INSTRUCTION NO. ____

On March 1, 2008, BASF and CSIRO entered into a contract, the Materials Transfer and Evaluation Agreement, or MTEA, in order to jointly evaluate each party's genes, promoters and constructs to see if there were options for further enhancing the levels of EPA and DHA in canola.

The terms of the contract include the following:

Results and any Intellectual Property subsisting in them will be owned, immediately upon creation, in the following way:

Joint New Results will be owned jointly by CSIRO and BASF Plant Science GmbH.

The following definitions are provided in the contract:

"Joint Results" are defined as "Results with respect to Joint Transformed Lines and Joint New Materials."

"New Materials" are defined as "constructs developed under the Evaluation incorporating Materials."

"Materials" are defined as "any genes, promoters and constructs of a Party identified in Schedule A and include copies, replicates, progeny or unmodified derivatives of the original Material. Materials include materials subsequently provided by a Party and Specified at the time of supply as being covered by the Agreement."

BASF contends that CSIRO breached the contract by seeking patent claims that recite *Brassica*. In order to succeed in their ownership claim, BASF Plant Science GmbH must show by a preponderance of the evidence that there was a legally enforceable obligation between CSIRO and BASF Plant Science GmbH; that CSIRO breached that obligation; that BASF Plant Science GmbH is entitled to a remedy as a result; and that the appropriate remedy is co-ownership of CSIRO's patents. CSIRO denies it breached the contract.

In order for a patent to be jointly owned under the MTEA, the patent claims must claim Joint Results. Joint Results include only results concerning constructs containing both CSIRO and BASF Plant Science GmbH genes developed under the Evaluation.

Under the MTEA, the parties were free to use information or materials in the public domain or independently developed by the party. Whether BASF Plant Science GmbH is a co-owner must be decided separately for each asserted patent because BASF Plant Science GmbH can be a co-owner of one or more asserted patents without being a co-owner of all of the asserted patents.

CSIRO denies it breached the contract. CSIRO also claims and has the burden of proving that BASF Plant Science GmbH failed to bring its breach of contract claims within the statute of limitations of five years after the breach occurred.

DATED: October 31, 2019

Respectfully submitted,

/s/ Richard Ottinger

Richard Ottinger (Virginia Bar #38842)
rottinger@vanblacklaw.com
Vandeventer Black LLP
101 West Main Street
500 World Trade Center
Norfolk, VA 23510
Telephone: (757) 446-8600
Facsimile: (757) 446-8670

Michael Ng (Admitted *Pro Hac Vice*)
michael.ng@kobrekim.com

Daniel Zaheer (Admitted *Pro Hac Vice*)
daniel.zaheer@kobrekim.com

Hartley M.K. West (Admitted *Pro Hac Vice*)
hartley.west@kobrekim.com

Michael M. Rosen (Admitted *Pro Hac Vice*)
michael.rosen@kobrekim.com

Kobre & Kim LLP
150 California Street, 19th Floor
San Francisco, CA 94111
Telephone: (415) 582-4800
Facsimile: (415) 582-4811

Rebecca G. Mangold (Admitted *Pro Hac Vice*)
rebecca.mangold@kobrekim.com

Jonathan E. Barbee (Admitted *Pro Hac Vice*)
jonathan.barbee@kobrekim.com

Alexa Perlman (Admitted *Pro Hac Vice*)
alexa.perlman@kobrekim.com

Giorgos Stamatopoulos (Admitted *Pro Hac Vice*)
george.stamatopoulos@kobrekim.com
Kobre & Kim LLP
800 3rd Ave
New York, NY 10022
Telephone: (212) 488-1200
Facsimile: (212) 488-1220

Hugham Chan (Admitted *Pro Hac Vice*)
hugham.chan@kobrekim.com

Kobre & Kim LLP
1919 M Street, NW
Washington, DC 20036
Telephone: (202) 664-1900
Facsimile: (202) 664-1920

Laura M. Gonzalez (Admitted *Pro Hac Vice*)
laura.gonzalez@kobrekim.com

Matthew I. Menchel
matthew.menchel@kobrekim.
Kobre & Kim LLP
201 South Biscayne Boulevard
Suite 1900
Miami, FL 33131
Telephone: (305) 967-6100
Facsimile: (305) 967-6120

*Attorneys for Counterclaimant Commonwealth
Scientific and Industrial Research Organisation*

Miranda Jones (Admitted *Pro Hac Vice*)
mirandajones@porterhedges.com
Andrew B. Raber (Admitted *Pro Hac Vice*)
araber@porterhedges.com
Megan Mon-Ting Luh (Admitted *Pro Hac Vice*)
mluh@porterhedges.com
Erin C. Villasenor (Admitted *Pro Hac Vice*)
evillasenor@porterhedges.com
Porter Hedges LLP
1000 Main Street, 36th Floor
Houston, TX 77002
Telephone: (713) 226-6000
Facsimile: (713) 226-1331

*Attorneys for Counterclaimant Grains Research and
Development Corporation*

Lawrence M. Sung (Admitted *Pro Hac Vice*)
lsung@wileyrein.com
Teresa Summers (Admitted *Pro Hac Vice*)
tsummers@wileyrein.com
Alexander Owczarczak (Admitted *Pro Hac Vice*)
aowczarczak@wileyrein.com
Wiley Rein LLP
1776 K Street, NW
Washington, DC 20006
Telephone: (202) 719-7000
Facsimile: (202) 719-7049

Attorneys for Counterclaimant Nuseed Pty Ltd.

Certificate of Service

I hereby certify that on October 31, 2019 I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

/s/ Richard Ottinger _____

Richard Ottinger
Virginia Bar Number: 38842
rottinger@vanblacklaw.com
Vandeventer Black LLP
101 West Main Street
500 World Trade Center
Norfolk, VA 23510
Telephone: (757) 446-8600
Facsimile: (757) 446-8670
Counsel for Defendant and Counterclaimants